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No. 690

In the

Supreme Court of the United States

OCTOBER TERM, 196

G. C. NUNN, *Receiver*, HORACE SMITH, FRED NEMEROVSKI, HARRY BALLIS and MYRTLE BALLIS,
Petitioners,

v.

R. L. FELTINTON, LYDIA M. FELTINTON, SAMUEL C. LURIE, JOSEPHINE M. LURIE, WILLIAM L. LURIE, individually and as Trustee, and RITA M. LURIE,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
A. Opinions of the Courts Below	2
B. Jurisdiction	2, 3
C. Questions Presented for Review	3, 4
D. Statutes and Constitutional Provisions	4, 5
E. Statement	5-8
F. Reasons for Allowance of the Writ	
No jurisdiction based on diversity of citizenship	8-14
Denial of due process by application to Texas land of Illinois statute not entitled to full faith and credit	15-37
Appendix "A"	39
Appendix "B"	56
Appendix "C"	57
Appendix "D"	59

Page

Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518 18, 24, 30, 35

American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534 10, 11, 12, 14

Article 489(b), Section 7, Texas Banking Act 26

Article 1288, Revised Civil Statutes of Texas, 1925 26

Baldwin v. Johnson, 95 Texas 85, 65 S. W. 171 19

Banigan v. Worcester, 30 Fed. 392 13

Barnett v. Poole, 23 Texas 418 21

Barney v. Latham, 103 U. S. 205, 26 Law Ed. 514 (1880) 11

Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165 33, 34

Brine v. Hartford Fire Ins. Co., 96 U. S. 627, 24 L. Ed. 868 17, 25

C.&A. RR Company v. Tranbarger, 238 U. S. 67, 35 Sup. Ct. 678 26

Carpenter v. Pink, 133 Tex. 82, 124 S. W. 2d 981 30

Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804 19, 24, 32, 33, 35

Chesapeake & Ohio Railway Company v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278 11

Clark v. Graham, 6 Wheat. 677, 5 L. Ed. 334 17, 25

Clarke v. Williard, 292 U. S. 112, 54 Sup. Ct. 615 (1934) 27, 31

Colden v. Alexander, 141 Texas 134, 171 S. W. 2d 328 17, 25

Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269 28

Courseview, Inc. v. Phillips Petroleum Company, 158 Texas 397, 312 S. W. 2d 197 15, 20

Currie, Full Faith and Credit to Foreign Land Decrees, 21 University of Chicago Law Review 620, pages 648-657 32

Page

Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16 19, 23, 24, 30, 31, 35

Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134 28

Evans v. Ropte, 128 Texas 75, 96 S. W. 2d 973 17, 21

Fallat v. Gouran, 220 Fed. 2d 325 13

Fall v. Eastin, 216 U. S. 1, 30 Sup. Ct. 3 21, 36

Federal Rules of Civil Procedure, Rule 20 10

Fischer v. American United Life Ins. Co., 314 U. S. 549, 62 Sup. Ct. 380 27, 31, 32

Green v. Biddle, 8 Wheat. 1, 5 L. Ed. 547 17, 25

Humble Oil & Refining Company v. Blankenburg, 149 Texas 489, 235 S. W. 2d 981 7, 15, 19-20, 33

International Shoe Company v. Pinkus, 278 U. S. 261, 49 Sup. Ct. 108 27

Lee v. Lehigh Valley Coal Co., 267 U. S. 542, 45 Sup. Ct. 385 12

McCormick v. Sullivant, 10 Wheat. 202 17, 25

McElreath v. McElreath, Tex., 1961, 345 S. W. 2d 722, 725 16, 29, 31

McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545 17, 25

Mexican Central Ry. Co. v. Eckman, 188 U. S. 429 13

Moore's Federal Practice, Volume 1, Pages 644, 645 9, 10

Morris v. E. I. duPont deNemours & Co., 68 Fed 2d 788, 791 11

Morris v. Hand, 70 Texas 481, 8 S. W. 210 21

Morris v. Jones, 329 U. S. 545, 67 Sup. Ct. 451 17, 27, 31

Moseby v. Burrow, 52 Texas 396 21

	Page
New Orleans v. Gaine's, Administrator, 138 U. S. 595	13
Olmstead v. Olmstead, 216 U. S. 386, 20 Sup. Ct. 292	27
Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629	18, 19
Relf v. Rundle, 103 U. S. 222, 26 L. Ed. 337	27, 31
Restatement, Conflict of Laws, Sections 48, 50, 223	21
Restatement, Conflict of Laws, Sections 50-53	32
Restatement, Conflict of Laws, Sec. 97	32
Restatement, Conflict of Laws, Sec. 264	28
Rule 19, Supreme Court Rules, Section 1, Subdiv. (b)	2
Rules 108, 109, 114-116, Texas Rules of Civil Procedure	25
Rules 783-809, Texas Rules of Civil Procedure	25
Runyan v. Coster, 14 Peters 122	17, 25
Salem Trust Company v. Manufacturers' Finance Company, 264 U. S. 182, 44 Sup. Ct. 266	11
Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108	22
Section 264(a), United States Code, Title 12	26
Second National Bank v. New York Silk Manufacturing Company, 11 Fed. 532	13
Security Trust Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545	28
Smith v. Sperling, 354 U. S. 91, 77 Sup. Ct. 1112	14
Stoll v. Gottlieb, 305 U. S. 165, 59 Sup. Ct. 134	21, 22
Strawbridge v. Curtiss, 3 Cranch 267, 2 Law Ed. 435	9, 14
Teas v. Kimball, 257 Fed. 2d 817	17, 25
Texas Constitution, Article I, Section 1	24

	Page
Texas & Pacific Ry. Co. v. Gay, 86 Texas 571, 26 S. W. 599	17, 21, 26
Title 28, United States Code, Section 1254, Subdiv. (1)	2
Title 28, United States Code, Section 1332	11
Title 28, United States Code, Section 1441	9, 12
Title 28, United States Code, Section 1652	15, 19
Title 31, Articles 1288-1301, Revised Civil Statutes of Texas, 1925	25
Title 42, Articles 1975-1976, Revised Civil Statutes of Texas, 1925	25
Title 42, Chapter 13, Articles 2293-2320; Revised Civil Statutes of Texas, 1925	17, 25, 33
Travis v. Yale & Towne Manufacturing Company, 252 U. S. 60, 40 Sup. Ct. 228	33
United States Constitution:	
Article III, Section 2	4
Amendments, Article X	4
Amendments, Article XIV, Section 1	3, 4
Article IV, Section 1	3, 4, 27, 30, 35
Article IV, Section 2	5, 8
Article VI	5
United States v. Crosby, 7 Cranch 115, 3 L. Ed. 287	17, 25
United States v. Fox, 94 U. S. 315, 24 L. Ed. 192	17, 25
Watkins v. Holman, 16 Peters 25, 10 L. Ed. 873	17, 21, 25
Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437	17, 21, 25, 31
Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 629	19, 23, 24, 30, 33
30-A, American Jurisprudence, page 910	21
41-A, Texas Jurisprudence, Page 758	10

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, G. C. NUNN, Receiver, HORACE SMITH, FRED NEMEROVSKI, HARRY BALLIS and MYRTLE BALLIS, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on December 12, 1961.

A

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals (Rec. 345-363) is not yet reported; it is attached as Appendix "A". The judgment of said Court is attached as Appendix "C"

The judgment and decree of the District Court for the Western District of Texas denying plaintiffs' motion to remand is dated January 25, 1960 (Rec. 59) and the final decree is dated November 17, 1960 (Rec. 176). There was no opinion by the Judge of the District Court and none has been reported.

B

JURISDICTION

The opinion of the United States Court of Appeals was delivered on September 15, 1961 (Appendix "A"); extension in time to file Rehearing was granted on October 9, 1961 (Appendix "B"); Rehearing was denied and judgment rendered December 12, 1961 (Appendix "C").

By order entered January 5, 1962, the mandate has been stayed provided that within thirty days from that date there should be filed the certificate of the Clerk of the United States Supreme Court that this petition and the record have been filed in that Court. (Appendix D.)

The jurisdiction of this Court is invoked under *Subdivision (1), Section 1254, Title 28, United States Code*, and *Subdivision (b), Section 1, Rule 19, Supreme Court Rules*, because

the Court of Appeals has decided important questions of State or territorial law in a way in conflict with applicable statutes and decisions of the State, and has decided questions of Federal law in a way in conflict with decisions of this Court or another Court of Appeals, and has decided an important question of Federal law which has not been, but should be, settled by this Court. The case actually presents substantial Federal questions as to the jurisdiction of Federal Courts based on diversity of citizenship and substantial State and Federal questions as to whether Texas Courts have or may apply a policy under which Illinois statutes and proceedings not entitled to full faith and credit are voluntarily chosen or adopted as Texas law determining possession of Texas land.

C

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a suit by three Illinois plaintiffs and two Texas plaintiffs to obtain possession of Texas land from four Illinois defendants and two New York defendants, the matter in controversy is "between citizens of different states" and removable to the Federal Court because the Illinois plaintiffs were joined with a Texas Receiver with authority to represent them in the case.

2. Whether Texas Courts have or may invoke a policy or choice of law under which Texas Courts, although not required to do so by *Article IV, Section 1*, may voluntarily adopt and apply Illinois statutes and proceedings in determining the right to possession of Texas land; and whether

the voluntary adoption of the law of a State having no power to act or interest in the subject matter deprives Petitioners of due process, equal protection and equal privileges and immunities of Texas law, guaranteed by *Amendments, Article XIV, Section 1.*

D

THE STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

On the question as to the jurisdiction of United States Courts based on diversity of citizenship, the provisions involved are *Article III, Section 2, United States Constitution; Section 1332, Title 28, United States Code;* and *Section 1441, Title 28, United States Code,* providing jurisdiction in and removal to United States Courts of actions in which the matter in controversy is between "citizens of different states."

As to the Constitutional effect of the voluntary choice by Texas Courts of Illinois law and proceedings to determine possession of land in Texas, the provisions of the United States Constitution involved in this case are—

> *Amendments, Article X,* reserving to the States, respectively, or to the people, all governmental power not conferred on the United States, thus leaving in each State the exclusive control of land in its territory;
>
> *Article IV, Section 1,* requiring full faith and credit to the public acts and judicial proceedings of the several States;
>
> *Amendments, Article XIV, Section 1,* prohibiting any State from denying any person the due process or equal protection of its laws or abridging the privileges and immunities of the citizens of the United States;

Article IV, Section 2, granting to citizens of each State the privileges and immunities of the citizens of the several States.

Article VI, making the Constitution the supreme law of the land.

E

STATEMENT

Petitioners brought suit in Cause No. 2478 in the District Court of Pecos County, Texas, 112th Judicial District, (Rec. 23-28), alleging the residence of the parties as follows:

Plaintiffs	*Defendants*
G. C. Nunn, a resident of Texas acting as Receiver under appointment of that Court in another cause, being No. 2458.	William L. Lurie, individually and as Trustee, and Rita M. Lurie, residents of New York.
Horace Smith, a resident of Texas.	
Fred Nemerovski, Harry Ballis and Myrtle Ballis, all residents of Illinois.	Robert L. Feltinton, Lydia M. Feltinton, Samuel C. Lurie and Josephine M. Lurie, all residents of Illinois.

The plaintiffs stated and proved without dispute that the West Side Trust and Savings Bank of Chicago, Illinois had the Texas land and transferred it by deed but reserved a portion of the mineral substances in and under the land and the possession or right to possession for the purpose of obtaining these mineral substances. Plaintiffs stated and proved without dispute that the Bank had been dissolved and showed that its right to possession had passed to plaintiffs and the

other former stockholders of the Bank under Texas law. Some of the former stockholders or their successors applied to a Texas Court for the appointment of a Receiver to manage, control and distribute these mineral substances. To protect and preserve the rights of all interested parties, both present and absent, known and unknown, the Texas Court appointed a Receiver and authorized suit to establish and obtain possession of the Texas land for mineral purposes.

The case was removed to the United States District Court for the Western District of Texas, Pecos Division, by a petition alleging jurisdiction based on diversity of citizenship. (Rec. 16-50.) Motion to remand was duly made (Rec. 51-57) and overruled, (Rec. 59), which ruling was and is specified as error.

As to this, the Court of Appeals held that the Illinois plaintiffs were formal or unnecessary parties because a Texas Receiver had authority to represent their interests, and that the matter in controversy was between citizens of different states, even though Illinois plaintiffs and Illinois defendants were propertly before the Court asserting directly their conflicting claims to possession of the Texas land, which conflicting claims were actually adjudicated between Illinois plaintiffs and Illinois defendants. (Appendix "A", Page 39).

2.

The facts as to the conflicting claims are largely undisputed and are stated in the opinion at Appendix "A".

Texas recognizes the ownership in place of mineral substances in and under its lands with the right to use so much of

the land as necessary to obtain the minerals. In this case, as in others, a substantial period of time elapsed between creation of the mineral right and the actual discovery of the minerals. During this interval, the Bank was dissolved and the present case involves a dispute as to the lawful succession to its ownership and right to possession of the Texas land for mineral purposes. See *Humble Oil & Refining Company v. Blankenburg*, 149 Texas 489, 235 S. W. 2d 981.

Both parties filed motions for summary judgment. The plaintiffs' motion showed an unbroken succession from and under the State of Texas to the Bank, the dissolution of the Bank, and that the plaintiffs were the owners or representatives of the interests of all of the shareholders of the Bank, and plaintiffs showed that applying Texas law to these facts, they were entitled to the possession of the mineral rights.

Defendants' motion and exhibits showed that the Chicago Bank had become insolvent; that an Illinois statute provided for dissolution and a receivership in that event; that such proceedings were had, at the conclusion of which there was executed a general transfer or assignment of all of the Bank's unknown or unlisted assets, and defendants argued that by applying the Illinois statute and enforcing the proceedings, they were the lawful successors to the Bank's right to the possession of the Texas minerals.

The District Court refused and denied plaintiffs' motion for summary judgment, granted and sustained defendants' motion, and entered a decree that plaintiffs take nothing by their suit (Rec. 176). The Court of Appeals affirmed the

action of the District Court, holding that regardless of whether the Illinois statute and receivership proceedings are entitled to full faith and credit, the Texas Courts have and will apply a policy by which they voluntarily recognize and adopt the Illinois statute and proceeding under it under the circumstances of this case. Petitioners deny that such policy exists and state that if it does, it adopts as part of the law of Texas a statute of Illinois, and proceedings under that statute, although Illinois has no power or control over Texas land, and its proceedings are not entitled to full faith and credit, and that such a choice of law violates Petitioners' rights under the *Fourteenth Amendment*, as well as *Article IV, Section 2.*

F

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The Court of Appeals has held that the matter in controversy is between citizens of different States because some of the plaintiffs were unnecessary parties, and has thus decided a Federal question in a way in conflict with applicable decisions of this Court and the decision of another Court of Appeals on the same matter.

The Court of Appeals has held that the Illinois plaintiffs who asserted directly a claim to the possession and use of the land were not necessary parties plaintiff to the suit, or were formal parties, so that the controversy was solely between citizens of different States. This holding is stated as follows:

> "The pertinent statutes and decrees governing the present receivership have already beeen set forth. *in*

extenso. From a mere reading of them it clearly appears that Nunn was a general receiver, vested not only with possession but with control of the title and authority to sue, representing, by order of the appointing court, the entire interest claimed by the shareholders and all rights of action in respect to it. We conclude that the three Illinois stockholders were mere formal or unnecessary parties, and that their joinder does not prevent the removal of the action nor defeat federal jurisdiction."

This case was brought into the Federal Court by removal under the provisions of *Section 1441, Title 28, United States Code*, which permits removal of cases within the original jurisdiction of the Federal Courts. The original jurisdiction of the Federal Courts is prescribed in *Section 1332, Title 28, United States Code*, as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different states;"

The case of *Strawbridge v. Curtiss, 3 Cranch 267, 2 Law Ed. 435*, deals with a case in which several plaintiffs assert claims against several defendants, and it requires that each plaintiff be able to sue each defendant in the Federal Court, that is, all plaintiffs must be citizens of different States from all defendants; this requirement applies to parties of all classes, indispensable, conditionally necessary, and proper parties. *Moore's Federal Practice, Volume 1, Page 644, 645.*

It was proper for the Illinois plaintiffs to join with the Receiver in asserting a claim in which they had a joint and direct interest. *Rule 40, Texas Rules of Civil Procedure*, permits parties jointly interested in a claim to bring a single

suit in which all participate, and the same provision is made in *Rule 20, Federal Rules of Civil Procedure*, from which the Texas Rule was taken.

At no place in this proceeding has there been any plea or contention that the Illinois plaintiffs were not properly joined; no plea of misjoinder has been made, no request has been made or action taken to dismiss, drop or eliminate the Illinois plaintiffs from the case. The Illinois plaintiffs in their pleadings asserted personally and directly an interest in the subject matter and a claim for relief; they offered proofs to support their claims; the Court actually adjudicated the merits of their claim against them directly and personally by entering a judgment that plaintiffs "take nothing" by their suit. The decree so entered resembles closely that made by the District Court in *American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534*, and which decree has the affirmative effect of vesting in the defendants the title and possession that the plaintiff then has or claims. *41-A, Texas Jurisprudence, Page 758.* The *Finn* case holds that the Federal District Courts have no jurisdiction to enter such a decree in a controversy between citizens of the same State, even though some of them are not necessary parties to the case. The *Judicial Code* does not authorize the Federal District Courts to hear and determine controversies between plaintiffs and defendants who are citizens of the same State: the circumstance that some of the plaintiffs or defendants are not necessary parties does not authorize a determination of a controversy between citizens of the same State, as the District Court has done. ***Moore's Federal Practice, Volume 1, Page 644, 645.***

The *Judicial Code* speaks of *actions* (plaintiffs v. defendants) as separate and disitinct from the *controversy* arising in the action. *Section 1332, Title 28, United States Code; American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534.*

The Court of Appeals has cited *Barney v. Latham, 103 U. S. 205, 26 Law Ed. 514 (1880); Chesapeake & Ohio Railway Company v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278; Morris v. E. I. duPont deNemours & Co., 68 Fed. 2d 788, 791;* and *Salem Trust Company v. Manufacturers' Finance Company, 264 U. S. 182, 44 Sup. Ct. 266.* In each of these cases, the parties and controversy were as follows:

Plaintiff	*Defendant*
(State A)	(State B)
	(State A)
	Defendant

None of these cases holds that a Federal District Court may adjudicate the merits of a controversy between plaintiffs and defendants who are citizens of the same State upon the ground that some of the *plaintiffs* were not necessary parties.

All of these cases were decided at a time when the *Judicial Code* conferred a special right of removal where there was a "separable controversy" between the plaintiff and the removing non-resident defendant. In each of these cases the *controversy* between the plaintiffs and the removing defendant was between citizens of different States, and the resident co-defendant was not a necessary party to this controversy. In some of the cases, the resident defendant was fraudulently

or collusively joined for the purpose of preventing removal. All of these cases simply apply the language of the *Judicial Code* as it then stood and hold that the controversy between the plaintiff or plaintiffs and the removing defendant was separable and was between citizens of different States.

Lee v. Lehigh Valley Coal Co., 267 U. S. 542, 45 Sup. Ct. 385, merely expresses doubt as to whether a plaintiff can invoke this rule in other words, whether a plaintiff can sue a non-resident defendant and a resident defendant *in the Federal Court* and sustain Federal jurisdiction on the ground that a defendant voluntarily joined by him is unnecessary to the case.

In 1948 the *Judicial Code* was amended to eliminate removal in cases where there was a "sparable controversy" and provide removal only where there was a "separate and independent cause of action." *Section 1441 (c), Title 28, United States Code. American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534*, is identical on the facts with the above cases, but holds that because of the change in the *Code*, removal is no longer permitted; thus these cases which the Court of Appeals cites are no longer applicable, even on these facts. Regardless of this, the controversies in this case are as follows:

Texas	Illinois
Texas	Illinois
Illinois	New York
Illinois	

This does not present a controversy between citizens of the different States even under the repealed Code provisions.

The Court also cites *New Orleans v. Gaine's, Administrator, 138 U. S. 595; Mexican Central Ry. Co. v. Eckman, 188 U. S. 429,* and *Fallat v. Gouran, 220 Fed. 2d 325.* In each of these cases the controversies were as follows:

Plaintiff, as guardian or administrator	*Defendant*
(State A)	(State B)

In all of these cases the only plaintiff before the Court was the legal representative and the controversy between the legal representative and the defendants was between citizens of different States. In this case the controversy is as follows:

G. C. Nunn, Receiver for all claimants (Texas).	R. L. Feltinton and Lydia M. Feltinton (Illinois).
Horace Smith (Texas). Fred Nemerovski (Illionis).	Samuel C. Lurie and Josephine M. Lurie (Illinois).
Harry Ballis and Myrtle Ballis (Illinois).	William L. Lurie and Rita M. Lurie (New York).

Mexican Central Ry. Co. v. Eckman, 188 U. S. 429, states and recognizes that had the minor joined in the suit in his own name, or through a next friend, the controversy would be between citizens of the same State, and not within Federal diversity jurisdiction.

Second National Bank v. New York Silk Manufacturing Company, 11 Fed. 532; Bates v. New Orleans BR&VR Company, 16 Fed. 294; and *Banigan v. Worcester, 30 Fed. 392,* involved joint action by or against a legal representative

(Trustee or Receiver) and the beneficiaries of the trust or receivership, and in each of those cases it was held that the controversy was not between citizens of different States where some of the ficiarieis had the same citizenship as the opposing parties. In *Smith v. Sperling, 354 U. S. 91, 77 Supp. Ct. 1112*, certain stockholders acting as representatives asserted a derivative claim for and on behalf of the corporation, and for its benefit. This Court held that with the beneficiary properly in the case and properly aligned opposite citizens of the same State, the case was not within Federal diversity jurisdiction, even though the stockholders could have asserted the cause of action without the presence of the corporation.

The controversy in this case is whether the former stockholders of the Bank are entitled to establish and recover the possession, use and occupancy of the land for the exercise of their rights. Citizens of the same State were on opposite sides of this controversy on the face of the pleadings, as developed by the proofs, and as adjudicated in the decree. The presence in the case of a legal representative still leaves citizens of the same State as substantial opponents in this controversy, and since they were, the case is not within the original jurisdiction of the Federal Courts and was improvidently removed, based on diversity of citizenship. The Court of Appeals holding to the contrary conflicts with *Strawbridge v. Curtiss, 3 Cranch 267, 2 L. Ed. 435; American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534;* and *Smith v. Sperling, 354 U. S. 91, 77 Sup. Ct. 1112.*

2. In actions for possession of land, the State Courts are required to apply the law of the State where the land is unless the State law is displaced by an act or proceeding entitled to full faith and credit under Article IV, Section 1; the voluntary adoption and application of the statutes and proceedings of Illinois deprives Petitioners of due process, equal protection and equal privileges under Amendments, Article XIV, Section 1, and Article IV, Section 2. In holding to the contrary, the Court of Appeals has decided important questions of State or territorial law in conflict with applicable statutes and decisions of Texas, and has decided Federal questions in conflict with applicable decisions of this Court and its decisions on the same matter, and has decided important Federal questions which have not been, but should be, settled by this Court.

Petitioners were plaintiffs in the District Court and there established without dispute that they were the successors to and representatives of the interests of all of the shareholders of this Bank. The District Court and Court of Appeals are required, in diversity cases, to apply the statutes and decisions of Texas. *Section 1652, Title 28, United States Code.* Applying only Texas statutes and decisions, plaintiffs, as shareholders of the dissolved corporation, are entitled as its successors to recover the possession of the Texas land. *Humble Oil & Refining Company v. Blankenburg, 149 Texas 489, 235 S. W. 2d 891; Courseview, Inc. v. Phillips Petroleum Company, 158 Texas 397, 312 S. W. 2d 197.*

The District Court refused plaintiffs' claim for possession and the Court of Appeals affirmed that judgment, but

did not base its judgment on Texas statutes and decisions. The Court of Appeals invoked a statute of the State of Illinois and certain proceedings under that statute, and based its judgment on these (Rec. 356).

Texas has the exclusive physical power to control or confer possession of Texas land and under the authorities cited below, the Texas Courts are not required by *Article IV, Section 1*, to give full faith and credit to Illinois statutes and proceedings which attempt to confer possession of land in Texas. The Court of Appeals holds that, notwithstanding this, the Courts of Texas will voluntarily apply the Illinois statute and voluntarily enforce the proceedings under that statute, and holds and states as follows:

> "It is not necessary to decide whether Article IV, Section 1 of the Constitution of the United States and Section 1738 of Title 28, United States Code, require that Texas courts give full faith and credit to the Illinois statute under which title was vested by the Auditor in the Illinois Receiver, for under a very recent decision of the Supreme Court of Texas it would seem clear that, since no established public policy of the State of Texas has been violated, the Texas courts would recognize the title of the Illinois Receiver upon the principles of comity." *McElreath v. McElreath, Tex., 1961, 345 S. W. 2d 722, 725.*

As to this holding, Petitioners bring this complaint—

(a) In holding that Texas Courts may refer to and apply statutes and decisions of other States in determining possession of Texas land, and that Texas statutes and decisions are not exclusive on this matter, the Court of Appeals has decided an important question of State law in conflict with.

State decisions and its own decisions. *Colden v. Alexander, 141 Texas 134, 171 S.W. 2d 328; Teas v. Kimball, 257 Fed. 2d 817.* In so holding, the Court of Appeals has decided a question of Federal Constitutional law in conflict with decisions of this Court. *United States v. Crosby, 7 Cranch 115, 3 L. Ed. 287; United States v. Fox, 94 U. S. 315, 24 L. Ed. 192; Watkins v. Holman, 16 Peters 25, 10 L. Ed. 873; Green v. Biddle, 8 Wheat 1, 5 L. Ed. 547; Clark v. Graham, 6 Wheat 577, 5 L. Ed. 334; Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437; Brine v. Hartford Fire Insurance Company, 96 U. S. 627, 24 L. Ed. 868; McCormick v. Sullivant, 10 Wheat 202; McGoon v. Scales, 9 Wall 23, 19 L. Ed. 545; Runyan v. Coster, 14 Peters 122.*

(b) In holding that Texas Courts may apply or adopt the receivership statutes and proceedings of other States and that Texas law on this matter is not exclusive, the Court of Appeals has decided an important question of State law contrary to the statutes and decisions of Texas. *Title 42, Chapter 13, Articles 2293-2320, Revised Civil Statutes of Texas, 1925; Texas & Pacific Railway Company v. Gay, 86 Texas 571, 26 S. W. 599; Evans v. Ropte, 128 Texas 75, 96 S. W. 2d 973; Moseby v. Burrow, 52 Texas 396; Barnett v. Poole, 23 Texas 518.* In so holding, the Court of Appeals has also decided a Federal Constitutional question contrary to decisions of this Court in *Morris v. Jones, 329 U. S. 545, 67 Sup. Ct. 451.*

(c) In holding that Texas Courts, bound by exclusive State law, may apply a statute or proceeding of another

State which is not entitled to full faith and credit, the Court of Appeals has decided an important Federal question contrary to prior decisions of this Court. *Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518; Pacific Employers Insurance Company v. Industrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629.*

(d) In holding that Texas Courts may voluntarily apply, as to Texas land, Illinois statutes and proceedings which are not entitled to full faith and credit, the Court of Appeals has announced a rule or choice of law which denies Petitioners due process and equal protection under the *Fourteenth Amendment* because the Texas Courts must apply Texas law unless required to give full faith and credit to the Illinois statute and proceeding. The Texas Courts are not authorized to apply the Illinois statutes and proceedings to Texas land by Texas law, nor by the Federal Constitution, and the judgment made with reference to the Illinois statutes and proceedings is not based on anything which is law, but is based on the Court's knowledge of the existence of something which is not law, and this is a denial of due process and equal protection. This is an important Federal question which has not been, but should be, settled by this Court in its specific application to possession of land. This Court has, in prior decisions, recognized and stated that the application of the law of a State which has no power over or governmental interest in the subject of the controversy is a denial of due process. *Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518; Pacific Employers Insurance Company v. In-*

dustrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629; Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.

The Court of Appeals decision is contrary to the statements, holdings and decisions of this Court in these cases.

Wherefore, Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit and in support of said petition, submit arguments and authorities as follows:

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

In diversity cases, the United States Courts are bound by the State statutes and rules of decision *(Section 1652; Title 28, United States Code)*, and function as State Courts, and will be referred to as such in this Petition.

To such State Courts, plaintiffs presented pleadings and proof showing that as the shareholders, or representatives of shareholders, of a dissolved corporation they had the right to possession of land belonging to such dissolved corporation under Texas decisions, are granting the right to possession of its lands, including mineral rights, based on the same and identical proof as that offered by these plaintiffs. *Baldwin v. Johnson, 95 Texas 85, 65 S. W. 171; Humble Oil & Refining Company v. Blankenburg, 149 Texas 489, 235 S. W. 2d 981;*

Courseview, Inc. v. Phillips Petroleum Company, 158 Texas 397, 312 S. W. 2d 197.

In opposition to plaintiffs' claim, the defendants offered—

(a) A statute of the State of Illinois, and

(b) Certain proceedings had in Illinois Courts under and pursuant to this statute.

The Illinois receivership proceeding, standing alone and unaided by the Illinois statute, is an unenforceable nullity as to Texas land. It is a usual insolvency receivership proceeding; after certain preliminary administrative steps (Rec. 11, 195), a complaint was filed by and in the name of the State of Illinois in one of its Courts (Rec. 182-194), and after summons was served, a decree was entered (Rec. 196-202), in which the Court found that a Receiver had been designated and appointed by the State Auditor, and had taken the possession of, and for purposes of receivership, the title to, the books, records and assets of every description of the Bank (Rec. 189). Thereafter, a successor Receiver applied to the Illinois Court for permission and power to sell the remaining assets of the Bank (Rec. 203-207), permission and power were granted, and a sale was held which did not describe or refer to the Texas land (Rec. 214-248), but in which a general transfer of all unknown and unlisted assets was executed and delivered (Rec. 249).

It is uniformly held that the Courts of one State are without jurisdiction to confer on officials of that State the

power to control or transfer the possession of land located in another State, even though the owner is personally subject to the jurisdiction of the Court, and such decrees, and the transfers made pursuant to them, are unenforceable and void. *30-A, American Jurisprudence, Page 910; Morris v. Hand, 70 Texas 481, 8 S. W. 210; Barnett v. Poole, 23 Texas 418; Moseby v. Burrow, 52 Texas 396; Evans v. Ropte, 128 Texas 75, 96 S. W. 2d 973; Texas & Pacific Railway Company v. Gay, 86 Texas 571, 26 S. W. 599; Restatement, Conflict of Laws, Sections 48, 50, 223.*

Being void for lack of jurisdiction over the subject matter, full faith and credit is not required of such decrees or the attempted transfers made pursuant to them. *Watkins v. Holman, 16 Peters 25, 10 L. Ed. 873; Fall v. Eastin, 216 U. S. 1, 30 Sup. Ct. 3; Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437; Morris v. Hand, 70 Texas 481, 8 S. W. 210.*

The Court of Appeals does not hold that the Illinois receivership proceeding, as such, is entitled to full faith and credit, nor does it hold that the Texas Courts will voluntarily recognize and enforce the receivership proceeding as such; an attempted voluntary recognition of the proceeding, without the statute, would result in a determination of plaintiffs' rights by and in a Court which had no jurisdiction to act on the subject matter; the Court's jurisdiction would not be supplied by its general findings in a proceeding which nowhere mentioned the Texas land *(Stoll v. Gottlieb, 305 U. S. 165, 59 Sup. Ct. 134)* and an effort to bind these plaintiffs to a determination of their rights by and in a Court which had no jurisdiction of the subject

matter would deprive Petitioners of due process of law. *Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108.*

So the sole question is whether the Illinois statute is to be applied in this case in determining the right to possession of Texas land, and in displacing a receivership as to that land in a Texas Court, for unless the Illinois statute is made the basis for the determination of these matters, the proceeding is unenforceable, and no defense to plaintiffs' claim.

The Court of Appeals does not hold that the Illinois statute is entitled to full faith and credit under *Article IV, Section 1*, but holds that the Courts of Texas will, in this case, voluntarily recognize, apply and enforce the Illinois statute in a suit concerning the possession of land in Texas.

This holding, and the public policy on which it is based, deprives Petitioners of due process of law; the right of State Courts to apply the laws and statutes of other States to cases before them, is subject to known and definite Constitutional limitations; these Constitutional limitations arise in these situations—

(a) *The Court's power is limited by the law of the State in which the Court sits.* The Courts are branches of the government *(Stoll v. Gottlieb, 305 U. S. 165, 59 Sup. Ct. 134)*; the Courts do not make the law, or establish the policy, or create their own jurisdiction, but must apply the law as it is given to them by the State or nation of which they are a part. Where the State law is exclusive, no choice of law is permitted; the State has made the law, and has made it ex-

clusive, and the Courts of that State may not make it optional by the voluntary application of the law of other States; where the State law is exclusive, the application of a statute of another State cannot be determined by reference to the law of that State, but is to be applied only when full faith and credit requires it. *Pacific Employers Insurance Company v. Industrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629.* For a State Court, bound by exclusive State law, and not required by full faith and credit, to apply in the Court's discretion the statute of another State deprives the litigant of due process; the plaintiff has a Constitutional right to have his case determined in a regular proceeding under the applicable law; the statute of another State is not the applicable law; it has not been enacted by the State in which the Court sits; the exclusive nature of the State law prevents its voluntary application by the Court; it is not made part of the law binding on the Court by the full faith and credit section; thus, statute is not part of the law which the Court is required or authorized to apply, and a decision of a case based on such statute is a decision, not based on law, but based on the Court's knowledge of the existence somewhere else of something which is not law, and this is not due process. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.*

(b) A State Court's power to apply the statutes of other States to cases before it is limited *by direct application of the due process section* of the *Fourteenth Amendment.* In those cases where the State law is not exclusive, and a choice

of law by the Courts is permitted, the State Court may apply the statute of another State only where such State has some power or control over, or governmental interest in, the subject matter of the case; the selection by a State Court of a statute of another State, and application of it to a case, where the enacting State has no power over or governmental interest in the subject of the litigation, is a capricious choice, and deprives the litigant of due process. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518; Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.*

Both of the above Constitutional limitations prevent the application of the illinois statute to this case.

1. *The Texas statutes and decisions are exclusive in determining the right to possession of Texas land, and the receivership proceedings in Texas Courts; the Illinois statutes and proceedings are not entitled to full faith and credit; the voluntary application by Texas Courts of the Illinois under these circumstances deprives Petitioners of due process.*

The exclusive control of the possession of land within its territory is one of the basic and fundamental powers reserved to the respective States by *Amendments, Article X*, and is claimed by Texas by reason of its existence as a State under the Constitution. *Texas Constitution, Article I, Section 1.* For this reason, the Texas statutes and decision are the sole body of law which Texas authorizes its Court to refer in

determining the right to possession of Texas land. *United States v. Crosby, 7 Cranch 115, 3 L. Ed. 287 (1812); United States v. Fox, 94 U. S. 315, 24 L. Ed. 192; Watkins v. Holman, 16 Peters 25, 10 L. Ed. 873; Green v. Biddle, 8 Wheat 1, 5 L. Ed. 547; Clark v. Graham, 6 Wheat 577, 5 L. Ed. 334; Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437; Brine v. Hartford Fire Insurance Company, 96 U. S. 627, 24 L. Ed. 868; McCormick v. Sullivant, 10 Wheat 202; McGoon v. Scales, 9 Wall 23, 19 L. Ed. 545; Runyan v. Coster, 14 Peters 122; Teas v. Kimball, 257 Fed. 2d 817; Colden v. Alexander, 141 Texas 134, 171 S. W. 2d 328.*

Texas has in effect a complete system of law pertaining to possession of land and a full procedural system for enforcing the right to possession of land. *Title 31, Articles 1288-1301, Revised Civil Statutes of Texas, 1925; Rules 783-809, Texas Rules of Civil Procedure.* These laws and rules must and do apply to all land, whether owned by residents or non-residents. *Title 42, Articles 1975-1976, Revised Civil Statutes of Texas, 1925; Rules 108, 109, 114-116, Texas Rules of Civil Procedure.*

Texas has in effect a complete statutory procedure for administering the affairs of dissolved corporations through a receivership. *Title 42, Chapter 13, Articles 2293-2320, Revised Civil Statutes of Texas, 1925.* Where the property consists of land or the right to possession of land, these statutes provide for a proceeding in the County where the land is located by a Receiver who is a resident of Texas and who acts under the control and jurisdiction of a Texas Court. The procedure so provided is by its nature and terms ex-

clusive. *Texas & Pacific Railway Company v. Gay, 86 Texas 571, 26 S. W. 599.*

No Texas statute authorizes the Judges applying Texas law to adopt, at their will and discretion, the law and statutes of other states in determining possession of land in Texas; such statute, if one existed, would not be a statute at all, but an ineffective delegation or abdication of the legislative function. *C.&A. RR Company v. Tranbarger, 238 U. S. 67, 35 Sup. Ct. 678.*

The statutes cited by the Court of Appeals are far removed from such an effort.

Article 489(b), Section 7, Texas Banking Act, provides in general terms that the Federal Deposit Insurance Corporation, an agency of the United States government *(Section 264(a), United States Code, Title 12)*, shall manage and control the property and assets of State banks insured by that corporation; *Article 1288, Revised Civil Statutes of Texas, 1925*, provides that the directors of dissolved corporations shall manage and control its properties; *Section 21.28, Texas Insurance Code*, contains express provisions requiring a Texas receivership for foreign corporations. In holding that Texas statutes are not exclusive as to possession of Texas land, and permit application of the law of other states, the Court of Appeals has decided an important question of state and Federal law in a way contrary to the applicable statutes and decisions of Texas, and the decisions of the Court cited above.

The Court of Appeals does not hold that the Illinois statute is entitled to full faith and credit so that the Texas Courts

are required to apply it, and under prior decisions of this Court, the Illinois statute is not entitled to full faith and credit under *Article IV, Section 1.*

The Illinois statute is a bankrupt or insolvency law; it is part of the general law of Illinois and prescribes the terms on which property, including land, is to be possessed in that State; such laws are limited to property within the territory of the state. *International Shoe Company v. Pinkus, 278 U. S. 261, 49 Sup. Ct. 108.* Full faith and credit to such statutes is not required in other states. *Olmstead v. Olmstead, 216 U. S. 386, 20 Sup. Ct. 292.*

Some corporate dissolution statutes confer on a Receiver or other official the personal capacity to represent the corporation to the extent necessary to preserve, protect and defend the rights of the dissolved corporation; the personal capacity so conferred is a status which is entitled to full faith and credit under *Article IV, Section 1,* and the Courts of other States must recognize the capacity of such Receiver or other official to appear in their proceedings for these purposes. *Relf v. Rundle, 103 U. S. 222, 26 L. Ed. 337; Clarke v. Williard, 292 U. S. 112, 54 Sup. Ct. 615 (1934).* But the statutes themselves, insofar as they prescribe rules of procedure, jurisdiction or provide distribution, are beyond the scope of *Article IV, Section 1,* and full faith and credit is not required of those statutes for those purposes in the Courts of other States. *Clarke v. Williard, 294 U. S. 211, 55 Sup. Ct. 356 (1935); Fischer v. American United Life Insurance Company, 314 U. S. 549, 62 Sup. Ct. 380; Morris v. Jones, 329 U. S. 545, 67 Sup. Ct. 451.*

The statute operates as a law even though it is phrased in terms of "title". The Illinois statute contains a provision for conferring on the Receiver the possession of, and for purposes of the receivership, the title to, the property of the dissolved corporation. As to this, the Court of Appeals holds and states as follows:

> "The Bank's charter was a contract between the Bank, its shareholders, and the State of Illinois; and the Illinois statutes became a part of that contract. Those statutes provided for the appointment by the Auditor of the receiver as statutory liquidator; and on his appointment, the receiver succeeded to the Bank's title to its assets of every description."

Some state statutes require the insolvent debtor to execute an instrument surrendering the property to the administering official for disposition under the insolvency statute; other statutes make the statute a transfer by virtue of its own force; regardless of the mechanics, the provisions for transfer of possession and title to the state official for administration under its insolvency law are merely means for execution of the statute, and are part of it, and do not include property beyond the territory of the enacting state. *Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269; Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134; Security Trust Company v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545. Restatement, Conflict of Laws, Sec. 264.*

When the Court of Appeals then says—

> "That Texas has no policy against transfer of title by the law of the state of incorporation to the liquidator of an insolvent or dissolved corporation is shown by Texas statutes making like provisions for Texas corporations,"

and—

> "* * * for under a very recent decision of the Supreme Court of Texas it would seem clear that, since no established public policy of the State of Texas has been violated, the Texas courts would recognize the title of the Illinois Receiver under the principles of comity. *McElreath v. McElreath, Tex., 1961, 345 S. W. 2d 722, 725.*"

it necessarily has adopted for purposes of this particular case a provision in a general statute of the State of Illinois and applied it to land in Texas as if it were part of the law of Texas; having adopted or applied the "title" provision which aids the enforcement of that law, the Court must and does adopt and apply all the remaining portions of the statute, including those which confer on the Illinois Court the power and jurisdiction to order a seizure and sale of land in Texas.

The law of Texas does not authorize Texas Courts to adopt, in their discretion, the Illinois statutes, but the exclusive nature of Texas law forbids Texas Courts to apply that of any other State; the full faith and credit section does not require the Texas Courts to apply the Illinois statutes, nor does the Illinois statute displace or supplant the laws of Texas under *Article IV, Section 1;* the Texas Courts have voluntarily applied the Illinois statute, and have done so without authority from the State of Texas, and without authority from the United States, and in so doing, have determined the plaintiffs' rights by reference to the statute books of other States, although the contents of those statute books have not been made part of the law of Texas by any governmental

authority, and this denies Petitioners due process of the Texas law which they are entitled to have applied to their case, but which has not been applied to their case. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.*

2. *If a choice of law by Texas Courts were permitted, the voluntary selection of the Illinois statute is not based on any established power or control over the subject of the litigation, or governmental interest in it, and the choice so made denies Petitioners due process of law.*

Under the above authorities, Texas law is exclusive, both in determining the right to possession of Texas land and the conduct of receivership proceedings in Texas Courts; where the Texas law is displaced or supplanted by the law of another State due to the effect of *Article IV, Section 1*, the Texas Courts are bound by *Article V* to apply such law, Texas law to the contrary notwithstanding, and Texas Courts dutifully do so; but the Texas reports show no instance in which Texas Courts, bound by exclusive State law, have voluntarily applied the law of another State when not required to do so by *Article IV, Section 1.*

The Court of Appeals has taken *Carpenter v. Pink, 133 Tex. 82, 124 S. W. 2d 981*, in which a New York Receiver appeared in a Texas Court to contest the fees charged by the Texas Receiver and his attorney, as a voluntary recognition by Texas Courts of receivership proceedings in other states.

Texas has no statute authorizing Texas Courts to recognize Receivers from other states, but where a Receiver is duly authorized to protect and preserve the rights of a dissolved corporation, his capacity in other states must be recognized under the full faith and credit section. *Relf v. Rundle, 103 U. S. 222, 26 L. Ed. 337; Clarke v. Williard, 292 U. S. 112, 54 Sup. Ct. 615 (1934).*

But this compulsory recognition pertains only to the *personal capacity* of the Receiver. Full faith and credit does not require enforcement of the law of another state or its proceedings under that law. *Clarke v. Williard, 294 U. S. 211, 55 Sup. Ct. 356 (1935); Morris v. Jones, 329 U. S. 545, 67 Sup. Ct. 451; Fischer v. American United Life Insurance Company, 314 U. S. 549, 62 Sup. Ct. 380.*

The Court of Appeals has taken *McElreath v. McElreath, Texas 1961, 345 S. W. 2d 727,* in which an Oklahoma Court in a divorce case ordered the husband to exercise his personal power of conveyance as to land in Texas, as an example of voluntary recognition by Texas of the proceedings of other states which indirectly determine the possession of Texas land. The power of a court to order an owner to execute a deed conveying land in another state has long been recognized. *Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437.* Such a decree is an order to the defendant, personally, to perform an act within the territory and jurisdiction of the Court, and is enforceable by the Court through its own processes and based on its own inherent jurisdiction, and such a decree is entitled to full faith and credit. *Currie, Full Faith and Credit to*

Foreign Land Decrees, 21 University of Chicago Law Review 620, Pages 648-657; Restatement, Conflict of Laws, Sec. 97.

This case was a *required* enforcement in Texas of a decree which is entitled to full faith and credit, not a voluntary adoption of Oklahoma law.

The only cited instance of a voluntary application or choice of the law of another State in determining possession of property is *Fischer v. American United Life Insurance Company, 314 U. S. 549, 62 Sup. Ct. 380.* The property there involved was *personal* property in the form of securities deposited with an Iowa official. An action to recover personal property is a transitory action; such personal property is not subject to an exclusive jurisdiction. *Restatement, Conflict of Laws, Sections 50-53.* The Iowa Courts may well have a choice as to whether to apply the Michigan law where the owner resided or the Iowa law where the property was situated, and might apply either, depending on Iowa's policy. See *Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Restatement, Conflict of Laws, Sec. 53.*

But this case is a real action, involving a fixed and immovable object as to which Texas law is and must be exclusive, and these decisions furnish no instance in which the Courts of Texas have voluntarily applied the statutes of other States to Texas land, nor any instance in which this Court has permitted them to do so.

Even in transitory actions, where the law of more than one State may apply, and a choice of law is permitted, the power and authority of State Courts to choose the applicable law

is limited by the due process and equal protection provision of the *Fourteenth Amendment;* the choice so made must be based on some known or established governmental power or interest in the subject of the litigation; a choice not based on these considerations is capriciously made and deprives the litigant of his Constitutional right to have his case determined under the applicable law. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review.*

The reasons given for applying the Illinois law are that the Bank was incorporated in Illinois and the rights of Texas creditors are not involved in the case. The constitution condemns State laws or policies which discriminate against citizens or corporations due to their residence. *Travis v. Yale & Towne Manufacturing Company, 252 U. S. 60, 40 Sup. Ct. 228.* Petitioners' right to possession does not depend on whether they have any creditors or whether the creditors have been paid. *Humble Oil & Refining Company v. Blankenburg, 149 Texas 489, 235 S. W. 2d 981.* Texas receivership proceedings must be made available for all shareholders, regardless of their residence. *Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165.* Texas receivership statutes provide an administration in the locality where the land is situated by a Receiver who is a Texas resident under control of Texas Courts after a notice specifically describing the subject of the receivership. *Title 42, Chapter 13, Sections 2293-2320, Revised Civil Statutes of Texas, 1925.* These are available safe-

guards to a land owner against an improvident disposition of his rights; the exhibits in this case show that the administration under the Texas receivership statutes will yield a surplus for the shareholders. By denying Petitioners possession because of a voluntary application of an Illinois law and proceeding, the Courts have denied Petitioners the equal protection of Texas law, due solely to their residence or citizenship in Illinois, and this is not permissible. *Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165.*

The subject of this case is the possession of Texas land, and Illinois has no control over or concern with which person possesses Texas land. The subject of this case is the application of the Texas receivership statutes and Illinois has no control over or concern with receivership proceedings involving land in Texas. The Illinois receivership omitted the Texas land from the inventory of the Bank's assets (Rec. 13) and the notice of said (Rec. 13). The Illinois receivership estate is neither increased by applying Illinois law to this case and denying Petitioners possession based on that law nor decreased by applying Texas law and granting Petitioners possession based on that law. No governmental interest or process of Illinois is impaired by granting Petitioners possession and making the Texas property readily accessible to the claims of creditors, which Illinois law was designed to accomplish in the first place. Illinois has no power which the Texas Courts can rightfully respect, and, in its receivership proceeding, has taken no action to which the Texas Courts

can properly defer. The application of Illinois law by a voluntary choice which is not based on sound legal or governmental considerations is a capricious choice and denies to Petitioners the due process and equal protection of the applicable Texas law to which they are entitled. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Alaska Packers Association v. Industrial Accident Commission 294 U. S. 532, 55 Sup. Ct. 518; Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.*

The question is of such importance as to justify granting the writ.

The possession and use of land is one of the basic and fundamental rights guaranteed to citizens of the United States, and protection of those rights is one of the basic duties of the respective States. The Court of Appeals has taken, or mistaken, this Court's holdings in the corporate dissolution cases as permitting the State Courts to invoke, in their discretion, the statutes and proceedings of other States, though not entitled to full faith and credit, and determine possession of land based on those statutes or proceedings. The rules of law governing possession of land should be as fixed and immovable as the land itself and not left to improvisation or to the expediency of the moment. The relations between the States in this matter are fixed by *Article IV, Section 1.* Unless the Illinois statute is made law in Texas by that section, then it is not law at all; unless

Petitioners are bound by a proceeding sufficient under that section, they are not bound at all. It has been fifty years since this Court in *Fall v. Eastin, 216 U. S. 1, 30 Sup. Ct. 3*, spoke as to the effect of the full faith and credit section in actions which determine possession of land. If the Court speaks again in this case, it will find from its prior decisions that in such cases, the Judges applying State law are bound to apply the Constitution first, the State law second, and have no third choice or option. The judgments below are without basis in *Article IV, Section 1*, and without basis in Texas law, and are not the result of the application of anything which is law, and thus deny Petitioners the possession because of a statute of Illinois which is not law in Texas, and this denies due process of law and equal protection of law to Petitioners.

In applying acts and decrees of other States to land, the Courts of the situs State are to go just so far as full faith and credit requires, and due process forbids those Courts to go any further. The line between the two may not be easy to find, but, when established, it is at once a goal which must be reached and a boundary which must not be crossed. When the Constitution is applied in this way, these Petitioners are entitled to possession of this land in any Court, State or Federal.

WHEREFORE, premises considered, Petitioners pray that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit, and that upon hearing hereof, the judgment of the Court of Appeals and of the District Court be

reversed, and that the cause be remanded to the District Court with instructions to sustain those of plaintiffs' motions as the Court may determine, and Petitioners further pray for such other relief as they may be entitled.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF SERVICE

A copy of this petition for writ of certiorari has been served upon the Respondents by mail by depositing a copy of the same in the United States Post Office with first class postage prepaid, addressed to Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas, Texas, which is the post office address of said counsel of record for Respondents.

APPENDIX "A"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18771.

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI and HARRY BALLAS,

Appellants,

versus

ROBERT L. FELTINTON, *et al.*,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(September 15, 1961)

Before HUTCHESON, RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: On the merits the question is whether the district court correctly held that valid sale of real properties located in Texas had been made by a statutory liquidator for an Illinois bank pursuant to a decree of an Illinois state court. Before reaching the merit, a question of the requisite diversity of citizenship to confer federal jurisdiction must first be decided. That question is whether a Receiver appointed by a Texas state court to administer such properties and assets of the Bank as remained at the time of

dissolution was the exclusive representative of the former stockholders of the Bank to the extent that the joinder with the Receiver of three such stockholders, residents of Illinois, would not defeat federal jurisdiction.

The action was commenced by the appellants in the District Court of Pecos County, Texas, and was removed to the district court on the ground of diversity of citizenship.[1] The district court denied the plaintiffs' motion to remand. The plaintiffs were G. C. Nunn, Receiver, a resident of the State of Texas, acting under appointment of the State District Court in a different case; Horace Smith, a Texas resident; and three Illinois residents, Fred Nemerovski, Harry Ballis and Myrtle Ballis. The defendants were four Illinois residents and two New York residents. Thus, on the face of the pleadings residents of Illinois appeared as plaintiffs and as defendants, and there was not that complete diversity of citizenship requisite to federal jurisdiction.[2]

The action concerned nonparticipating royalty interests on the oil, gas and other minerals in and under described lands in Pecos County, Texas, and was in trespass to try title, to quiet title, for cancellation and removal of clouds on title, and for declaratory judgment. The nonparticipating royalty interests in suit had been owned by the West Side Trust & Savings Bank, an Illinois corporation, through whom all parties claim. The plaintiffs claim as successors in interest of the Bank on its dissolution.[3] The defendants claim that all of the assets of the Bank were disposed of be-

[1] 28 U. S. C. A. §1441 (a), §1332.
[2] Strawbridge v. Curtiss, 1806, 7 U. S. 159 (3 Cranch 267); Haynes v. Felder, 5 Cir., 1957, 239 F. 2d 868.
[3] See Peurifoy v. Wiebusch, Tex. 1938, 117 S. W. 2d 773, 775; Vernon's Civil Statutes of Texas, Art. 1388.

fore dissolution, and that through such disposition the defendants acquired title to the royalty interests.

Attached as an exhibit to the petition for removal was a copy of the order appointing Nunn as Receiver and of another order entered shortly after such appointment. The Receiver had been appointed at the instance of the individual parties plaintiff. That part of the order of appointment defining the Receiver's powers and duties provides that G. C. Nunn

> "• • • be, and he is hereby, appointed Receiver of the property, rights, claims, causes of action, both real and personal, situated within the State of Texas, and particularly is appointed Receiver to take charge and control of and manage and control the right, title, interest, claim, demand, cause of action or other interest of the West Side Trust and Savings Bank of Chicago, and which it had at the time of its dissolution, and the interest of the stockholders or former stockholders, officers, agents or directors, or their successors, as well as the depositors and creditors of such bank and which remained vested in such bank at the time of its dissolution, in and to the following described real estate situated in Pecos County, Texas, to-wit:
>
> "• • • • •
>
> "• • • and that after qualifying as Receiver herein, he exercise all of the right, power, custody and control over such assets and property as may be conferred upon receivers by the statutes and rules of procedure of this State and the further Orders of this Honorable Court."

A week after appointing the Receiver, the Texas District Court approved a contract between the Receiver and Horace Smith, one of the plaintiffs, and certain attorneys, containing the following provisions:

> "'In consideration of such agreement and the services performed and to be performed by such attorneys the

undersigned Receiver agrees that he will, out of any property, assets, demands, claims, causes of action or other interests which may be discovered or reduced to possession and title established in the Receiver or the Receivership estate, transfer, assign, grant, sell and convey unto said attorneys an undivided ¼ interest * * *.

"G. C. Nunn, Receiver, in consideration of the obligation herein set out to be performed by Horace Smith agrees that he will, out of any property, assets, demands, claims, causes of action or other interests which may be discovered or reduced to possession and title established in the Receiver or the Receivership estate, transfer, assign, grant, sell, and convey unto said Horace Smith an undivided ¼ interest * * *.

"* * *

"This agreement and any transfer, assignments, convevances, deed or other instrument presumptive hereto shall be binding on all stockholders, depositors, creditors, and other persons having an interest in such property and is assigned, free and clear of all liens, claims and encumbrances with full warranty of title in so far as the Receiver is permitted by law to warrant title.

"Any legal action that may be instituted shall be in the name of the receiver * * *."

The pertinent Texas statutes relating to the appointment, power and authority of the Receiver are Articles 2293 (3), 2297 and 2310, Rev. Civ. Stat. of Texas:

"*Art. 2293. Appointment*

"Receivers may be appointed by any judge of a court of competent jurisdiction of this State, in the following cases:

"* * *

"3. In cases where a corporation is insolvent or in imminent danger of insolvency; or has been dissolved or has forfeited its corporate rights."

"*Art. 2297. Receiver's power*

"The receiver shall have power, under the control of the court, to bring and defend actions in his own name as receiver, to take charge and keep possession of the property, to receive rents, collect, compound for, compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize."

"*Art. 2310. Suit by or against*

"When property within the limits of this State has been placed in the hands of a receiver who has taken charge of such property, such receiver may, in his official capacity, sue or be sued in any court of this State having jurisdiction of the cause of action, without leave of the court appointing him. If judgment is recovered against said receiver, the court shall order said judgment paid out of any funds in the hands of said receiver as such receiver."

The position of the defendants, sustained by the district court, is that the Receiver has capacity to use for title and in so doing to represent shareholders, depositors and creditors of the Bank, and that it is the citizenship of the Receiver, and not that of those he represents, which determines jurisdiction.

The plaintiffs, on the other hand, insist that the appointment of the receiver did not divest the shareholders of title to the property, nor vest it in the Receiver, and that the shareholders have the right to sue for title to the property subject to the Receiver's right of possession.

It has been established from an early date that the joinder of formal or unnecessary parties cannot prevent the removal of an action to a federal court.[4] As the cases just cited show,

[4]Barnery v. Latham, 1880, 103 U. S. 205, 213, 215; Salem Trust Co. v. Manufacturers Finance Co., 1924, 264 U. S. 182, 189; Lee v. Lehigh Valley Coal Co., 1925, 267 U. S. 542, 543.

the right of removal depends upon the case disclosed by the pleadings when the petition for removal is filed, subject to the right of the defendant in its petition to show that parties joined by the plaintiff are not necessary parties. It is also well established "* * * that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers, etc." *New Orleans v. Gaines's, Administrator*, 1891, 138 U. S. 595, 606. See also *Mexican Central Ry. Co. v. Eckman*, 1903, 187 U. S. 429, 433, 434; *Fallat v. Gouzan*, 3 Cir., 1955, 220 F. 2d 325, 326, 327.

The question in this case depends upon the extent of the capacity of the Receiver, under the laws of Texas, to represent the stockholders, including the three Illinois residents who were joined with the Receiver as plaintiffs. The basis and theory upon which they were joined is thus alleged in the complaint:

> "The Plaintiff G. C. Nunn has the right to the possession, control, income, rents and revenue from the above lands and interests in his capacity as receiver under order and appointment of this Honorable Court in Cause No. 2458 pending on the docket of this Court to which reference is made. The Plaintiff Horace Smith is the owner of an undivided interest in the fee simple title to the above lands and interests by purchase and transfer from certain persons who are stockholders, or former stockholders, of the West Side Trust & Savings Bank in Chicago, Illinois, their heirs, successors and assigns. The Plaintiffs Fred Nemerovski, Harry Ballis and Myrtle

Chesapeake & Ohio Ry. v. Cockrell, 1914, 232 U. S. 146, 152; Morris v. E. I. duPont de Nemours & Co., 8 Cir., 1934, 68 F. 2d 788, 791; 45 Am. Jur., Removal of Causes, Sec. 136.

> Ballis were stockholders of the West Side Trust & Savings Bank in Chicago, Illinois, at the time it ceased doing business and at the time of its dissolution and are the owners of undivided interests in the above lands and property by virtue of having been such stockholders. The Plaintiffs Horace Smith, Fred Nemerovski, Harry Ballis and Myrtle Ballis are tenants in common and present this action on behalf of themselves and all of their co-tenants against the Defendants who are not their co-tenants, but who are strangers to the title, for the purpose of recovering for and on behalf of themselves and their co-tenants the entire interest in the above property formerly held for or by West Side Trust & Savings Bank, a dissolved corporation, of Chicago, Illinois."

The plaintiffs rely strongly upon *Abbey v. International & G. N. R. Co.'s Receivers*, 1893, 5 Tex. Civ. App. 264, 23 S. W. 934,[*] wherein it was held that,

> "The receivership did not invst the receivers with the title to the company's property. High Rec. § 302. The court, by means of a receivership, assumed the control and management of its property for the purposes of the receivership, and had power, through appropriate proceedings, to divest the corporation of its title. The case is unlike an assignment made by an insolvent person or corporation, by which the title is expressly conveyed. There exists no such relation between the owner and the receiver which admits of a judgment in respect to the title to property against the latter being res judicata as to the former." (23 S.W. at p. 935.)

That holding was clearly based upon the extent of the authority of the particular receiver under the law and the decree of the court providing for his appointment. Such law and decree do not, however, appear in the brief report of the opinion. Nor does the case hold what this quotation

[*] The plaintiffs rely also upon 36 Tex. Jur. 180 and 26 Tex. Jur. 288, which in turn rely upon the cited case.

out of context might imply. It holds that the owner is not bound by a judgment against a receiver where the suit was brought without leave of the receivership court having possession of the property in question unless the judgment is then pleaded in that court. The part quoted states that the receivership court may then divest the owner's title. The case does not imply either that the receivership court cannot make a binding adjudication of the owner's title, or that it may not empower the receiver alone to obtain such a binding adjudication from another court. Other Texas receivers have been held to be actually vested with legal title to the properties in their possession. *Smith v. Texas & N. O. R. Co.*, 1908, 101 Tex. 405, 108 S. W. 819, 821; *Hovel v. Kaufman*, Comm'n of App. of Tex., 1926, 280 S. W. 185, 187. As was said in *Herf & Frerichs Chemical Co. v. Brewster*, Tex. Civ. App., 1909, 117 S. W. 880, 882:

> "The rights and duties conferred upon receivers of the property an insolvent corporation and trustees in possession of the property of such a corporation under the appointment of a court of bankruptcy are largely the same. The title of the property of the insolvent corporation is vested in the receiver, or the trustee in bankruptcy, in trust for the benefit of the creditors, and it is his right and duty, when the interest of the creditors require, to compel by proper proceedings, the delinquent subscribers to pay the balance due on their unpaid stock, and with the fund thus acquired to discharge, as far as he may, the debts of the corporation. So long as the estate is being administered by the courts, the receiver or the trustee alone has the right to pursue the remedy provided by law for the collection of unpaid stock subscriptions. Commercial Bank v. Warthen, 119 Ga. 990, 47 S. E. 537, and authorities cited."

See also, *Cocke v. Wright*, Tex. Civ. App. 1927, 299 S. W. 446, affirmed 39 S. W. 2d 590; *Cox-Rushing Greer Co. v. Richardson*, Tex. Civ. App. 1925, 277 S. W. 718; *Oatman v. Boone*, Tex. Civ. App. 1922, 244 S. W. 398. The principle to be deduced from the cases is that the capacity and authority of a receiver over the title to the properties in his possession depend upon the statutes, laws and decrees which apply to the particular receivership.

The pertinent statutes and decrees governing the present receivership have already been set forth *in extenso*. From a mere reading of them it clearly appears that Nunn was a general receiver, vested not only with possession but with control of the title and authority to sue, representing, by order of the appointing court, the entire interest claimed by the shareholders and all rights of action in respect to it. We conclude that the three Illinois stockholders were mere formal or unnecessary parties, and that their joinder does not prevent the removal of the action nor defeat federal jurisdiction.

II.

The date of the order appointing Nunn as Receiver was March 3, 1959. The Bank had been dissolved many years theretofore, by judgment of an Illinois court on February 1, 1935, which was repeated in the final judgment of November 30, 1948. The Bank had been organized as a corporation under the banking laws of Illinois in 1905. The mineral royalty interests in controversy were owned by the Bank under reservations made in six deeds executed between the years 1927 and 1933. The Bank itself did not convey the interests in controversy prior to its dissolution. The defendants

deraign title through conveyances made by a statutory liquidator for the Bank pursuant to a decree of an Illinois state court. As has been stated, the plaintiffs claim that title remained in the Bank at its dissolution, and then passed by operation of Texas law to its stockholders.

The Auditor of Public Accounts of the State of Illinois caused an examination to be made of the affairs of the Bank as of the close of business on March 28, 1933. The examination disclosed this Bank's condition to be like that of so many other banks during that period. Its capital had become impaired and the impairment could not be made good. On account of that condition, the Auditor took possession of its assets on December 19, 1933, and retained control until January 12, 1934, at which time the Auditor found and determined that the Bank "cannot be reorganized and that the same should be liqiudated through receivership." The Auditor appointed a receiver and authorized and directed the receiver "to take possession of, and for the purpose of such receivership the title to the books, records and assets of every description of said bank and to collect all debts, dues or claims belonging to it and to conserve the same for the benefit of the creditors of said bank." The Auditor was acting in conformity with the Illinois banking laws. Section 11, Chapter 16½, Smith & Hurd Illinois Statutes provides for the appointment by the Auditor of a receiver under such circumstances, and provides that:

> "Such receiver, under the direction of the Auditor, shall take possession of, and for the purpose of the receivership, the title to the books, records and assets of every description of such bank, and shall proceed to col-

lect all debts, dues and claims belonging to it, and, upon the order of a court of record of the county in which said bank is located, may sell or compound all bad or doubtful debts, and on a like order may sell the real and personal property of such bank, on such terms as the court shall direct."

Three days after he had appointed a receiver pursuant to said statute, the Auditor filed a bill of complaint in the Superior Court of Cook County, Illinois, seeking the instructions and orders of that Court as to the liquidation and dissolution of the Bank. On February 1, 1953, the Court entered an order directing the Receiver to file an inventory of properties of the Bank coming into his possession or to his knowledge, and authorizing the Receiver to file proper petitions to sell real estate or personal property belonging to the Bank, and to complete all acts necessary to its liquidation. In the order the Court found that the Receiver had already taken possession of the title to all of the assets of the Bank of every description, pursuant to the Auditor's order of appointment and under the direction of the Auditor. The Court's order of February 1, 1935 also undertook to terminate the corporate existence of the Bank.[7]

Several successor Receivers were appointed by the Auditor, the last of whom was John W. F. Smith, appointed October 1, 1945. On December 30, 1946, John W. F. Smith as Receiver filed a petition for permission to sell all the remaining assets of the Bank. The petition states that there may have been a number of property interests of which the Receiver had no knowledge and that he asks permission to sell

[7] "G. It is Further Ordered that the said defendant, the West Side Trust and Savings Bank of Chicago, be and it is hereby dissolved and that its corporate existence be and the same is hereby terminated."

all such unknown contingent interests. The petition was granted in every particular by the court, and February 4, 1947 was set as the date of sale. The sale was held and the contingent unknown interests were sold to the United Mercantile Agencies, Louisville, Kentucky. On February 21, 1947, the sale was approved by the court. A search of the records of the receivership by both parties does not reveal that the specific mineral rights here in question were ever sold as a known interest, or excepted from the final sale, leading, by a process of elimination, to the conclusion that these rights were among the unknown contingent interests alluded to by the Receiver in his petition for permission to sell. The order of approval empowered and directed the Receiver "to indorse, transfer, assign, quit claim, set over and deliver" the assets tendered for sale at the auction. In accordance with the order, Smith as Receiver made an assignment of interest to the United Mercantile Agencies on March 17, 1947, intended to cover the unknown contingent interests."

On November 30, 1948, the court entered an order reciting that the Receiver had made lawful, proper, and appropriate disposition of all assets whatsoever belonging to the Bank, and that the affairs of the Bank had been fully liquidated under the direction and supervision of the Auditor, and that

"Assignment of Interest.

"Know All Men By These Presents, That I, John W. F. Smith, Receiver of The West Side Trust and Savings Bank, in consideration of the sum of One and No [illegible] Dollars ($1.00) and other good and valuable consideration, the receipt whereof is hereby acknowledged (sic), do hereby sell, assign, transfer, convey, quit claim, set over and deliver over unto United Mercantile Agencies, its successors and assigns, and to its own proper use and benefit, any and all other choses in action, liens, claims, judgments, rights, powers, privileges, titles, easements or interest in any and all other property, if any, real, personal (sic) or mixed belonging to The West Side Trust and Savings Bank of Chicago, or Receiver thereof, except: * * *."

the Auditor had discharged the Receiver as evidenced by a Certificate of Discharge, of which a copy was attached to the court's order. The court took "judicial cognizance of the discharge" of the Receiver by the Auditor, terminated the jurisdiction of the court with reference to the receivership and again ordered that the Bank be dissolved.[9]

On August 25, 1949, United Mercantile Agencies undertook to transfer the unknown contingency interests to one R. L. Feltinton, defendant and appellee in this suit.[10]

In 1952, Phillips Petroleum, a lessee of some of the rights here involved, traced the title so as to obtain a ratification of its lease. To this end, several additional instruments were made by the parties to the "unknown contingency interests" sales. The first new instrument was an assignment of interest by Smith as Receiver to the United Mercantile Agencies, which specifically conveyed the "oil, gas and other mineral rights reserved by L. H. Heymann, Trustee, in lands acquired by him under deed from Erling C. Martinson recorded in

[9] "It Is Further Ordered, Adjudged and Decreed that the corporate entity of the West Side Trust & Savings Bank, an Illinois Corporation, be, and it is hereby dissolved and the charter of said West Side Trust & Savings Bank, an Illinois corporation, be, and it is hereby declared null and void and of no further force and effect whatsoever."

[10] "General Assignment.

"Know All Men by these Presents, That United Mercantile Agencies, Incorporated, of Louisville, Kentucky, in consideration of Ten Dollars and other good and valuable consideration * * * to it paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto R. L. Felton (sic), of 220 South State Street, Chicago, Illinois, his executors, administrators and assigns, to his and their own proper use and benefit, all of the interest it acquired or could acquire as assignee of the Receiver of the West Side Trust & Savings Bank, under the contingency assignment covering any and all other choses in action, liens, claims and judgments, rights, privileges, titles, easements or interest in any and all other property belonging to West Side Trust & Savings Bank or the Receiver thereof not shown on sale notice."

Book 47, page 474, Pecos County, Texas Deed Records . . ." This instrument was backdated to September 16, 1948, prior to the discharge of Smith as Receiver. A second instrument of assignment, which had been signed over by United Mercantile Agencies in blank in 1949 to R. L. Feltinton for the purpose of inserting the description of any "unknown contingency interests" which he uncovered, was also completed with the above description of mineral rights. These instruments, along with copies of the Illinois Receiver's sale proceedings, but excluding the March 17, 1947 assignment of interest from Smith as Receiver to United Mercantile Agencies (see footnote 8, *supra*), were filed for record in Pecos County, Texas.

In 1958 the appellant Horace Smith made an investigation of the present ownership of the interests here in question. He then bought up 21% of whatever interests the stockholders of the dissolved Bank might still have as a result of the liquidation and dissolution proceedings. In January 1959, he filed suit in Pecos County, Texas, seeking a determination of his interests and the appointment of a receiver for any remaining assets in Texas land of the now dissolved West Side Trust and Savings Bank. On March 3, 1959, G. C. Nunn was appointed Receiver.

At this point, the March 17, 1947 assignment of interest from Smith as Receiver to United Mercantile Agencies was filed for record in Pecos County. In April of 1959 the present suit was begun in the District Court of Pecos County, Texas, and removed by the defendants to the United States District Court for the Western District of Texas.

We have carefully considered each of the criticisms of the title claimed by the defendants through the sale made by the Illinois Receiver. We agree that the mineral royalty interests are "real property" under Texas decisions.[11] We further agree that if the Illinois Receiver derived all of his title and authority from the Illinois court, the plaintiffs might prevail, for, under Texas public policy as defined by its legislature, no court, other than a Texas court, has power to appoint a receiver of property situated in Texas.[12] The Illinois Receiver did not, however, rely simply upon the Illinois court for his title and authority.

The Bank was incorporated under the laws of Illinois. Subsequent to the enactment of Section 11 of the Illinois Banking Act, to which reference has been made, providing for the appointment of a receiver by the Auditor when the capital of the Bank has become impaired and the Auditor has determined that the Bank cannot be reorganized, this Bank's charter was amended to increase its capital stock. The Bank's charter was a contract between the Bank, its shareholders, and the State of Illinois; and the Illinois statutes became a part of that contract. Those statutes provided for the appointment by the Auditor of the receiver as statutory liquidator, and on his appointment, the receiver succeeded to the Bank's

[11] Hager v. Stakes, 116 Tex. 453, 294 S. W. 855 (1927); Sheffield v. Hogg, 124 Tex. 290, 80 S. W. 2d 741 (1935); Japhet v. McRae, 276 S. W. 669 (Com. App., 1925); Caruthers v. Leonard, 254 S. W. 779 (Com. App., 1923).

[12] "When a person resides in this State and a receiver is applied for, or if the property sought to be placed in the hands of a receiver is situated within the limits of this State, no court other than one within the limits of this State, shall have power to appoint any receiver of said property." Art. 2313, 7 Tex. Civ. Stat.

title to its assets of every description.[11] The Texas decisions recognize the distinction between statutory liquidation and equity receivership.[12] That Texas has no policy against transfer of title by the law of the state of incorporation to the liquidator of an insolvent or dissolved corporation is shown by Texas statutes making like provisions for Texas corporations.[13] It is not necessary to decide whether Article IV, Section 1 of the Constitution of the United States and Section 1738 of Title 28, United States Code, require that Texas courts give full faith and credit to the Illinois statute under which title was vested by the Auditor in the Illinois Receiver, for under a very recent decision of the Supreme Court of Texas it would seem clear that, since no established public policy of the State of Texas has been violated, the Texas courts would recognize the title of the Illinois Receiver upon the principles of comity. *McElreath v. McElreath*, *Tex.*, 1961 345 S. W. 2d 722, 725.[14]

The description contained in the March 17, 1947, general assignment of interest by the Illinois Receiver to United Mercantile Agencies (see footnote 8, *supra*) was extremely general. The deposition of John W. F. Smith, the former Illinois Receiver, showed the description covered all of the

[11] Relfe v. Rundle, 1881, 103 U. S. 222; Keatley v. Furey, 1912, 226 U. S. 399; Clark v. Willard, 1934, 292 U. S. 112.

[12] State Board of Insurance v. Betts, Tex., 1958, 308 S. W. 2d 846; Carpenter v. Pink, Tex. 1939, 124 S. W. 2d 981.

[13] See Articles 1388 and 489B, R. C. S. Tex.; Article 21.28 of the Texas Insurance Code, Acts 1951, 52nd Legislature, Ch. 491.

[14] It is important to note that no rights of any Texas creditors of the Bank were asserted in this case. The only Texan shown to have any interest was the plaintiff Horace Smith, who in 1958 bought up supposed interests of the stockholders of the dissolved Bank in anticipation of this suit. Cf. Fischer v. American United L. Ins. Co., 1942, 314 U. S. 549, 555; Clark v. Willard, 1935, 294 U. S. 211, 214, 215.

assets of the Bank not known to the liquidating Receiver, and that he did not know of the royalty interests sued for. In Texas the description in a deed is not void for uncertainty unless, on its face, the description cannot be made certain by extrinsic evidence. 19 Tex. Jur. 2d, Sec. 121, pp. 424, 425. Likewise, the description in the general assignment executed by United Mercantile Agencies, Inc., to R. L. Feltinton, defendant and appellee in this suit (see footnote 10, *supra*), could be made certain by extrinsic evidence. We do not find it necessary to pass upon the validity of the deed made by Smith as Receiver to the United Mercantile Agencies in 1952 and backdated to September 16, 1948. Nor is it necessary for us to rule upon Feltinton's authority to fill in a more specific description in the blank assignment delivered to him by United Mercantile Agencies.

We conclude that all assets of the Bank were disposed of by the Illinois liquidating Receiver, and that the defendants-appellees deraign title through such disposition to the mineral royalty interests in suit. There being no substantial dispute as to the evidentiary facts, the question was properly decided by the district court on motions for summary judgment by denying the plaintiffs' motion and granting the defendants' motion. The judgment is

AFFIRMED.

That Feltinton probably did have such authority, see Glasscock v. Farmer's Royalty Holding Co., 5 Cir., 1945, 152 F.2d 607, 608, 609.

APPENDIX "B"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18771

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI and HARRY BALLIS,
Appellants,

versus

ROBERT L. FELTINTON, *et al.*,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

ORDER:—

Pursuant to the Motion of Appellants,

IT IS ORDERED that the time for filing the Petition for Rehearing in the above entitled and numbered cause is extended to and including November 1, 1961.

/s/ RICHARD T. RIVES
U. S. Circuit Judge

Dated: October 9, 1961

(ORIGINAL FILED—SEPTEMBER 9, 1961)

APPENDIX "C"

JUDGMENT

Extract from the Minutes of September 15, 1961

No. 18771

G. C. NUNN, RECEIVER, HORACE SMITH,
FRED NEMEROVSKI and HARRY BALLIS,

versus

ROBERT L. FELTINTON, *et al.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, G. C. Nunn, Receiver, Horace Smith, Fred Nemerovski and Harry Ballis, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18771

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI and HARRY BALLIS,
Appellants,

versus

ROBERT L. FELTINTON, *et al.*,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(DECEMBER 12, 1961)

ON PETITION FOR REHEARING

Before HUTCHESON, RIVES and WISDOM, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

Petition for Rehearing Filed 10/30/61
Petition for Rehearing Denied 12/12/61

APPENDIX "D"

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18771

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI and HARRY BALLIS,
Appellants,

versus

ROBERT L. FELTINTON, *et al.*,
Appellees.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein; to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ.

pon the expiration of thirty days from the date of this ; unless the above-mentioned certificate shall be filed the clerk of this court within that time.

ONE AT NEW ORLEANS, LA., this 5th day of Janu- 1962

/s/ JOHN MINOR WISDOM

United States Circuit Judge.

(ORIGINAL FILED—JANUARY 5, 1962)